TITLE 327 WATER POLLUTION CONTROL BOARD

#01-238 (WPCB)

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On October 9, 2002, the Water Pollution Control Board (board) conducted the first public hearing/board meeting concerning the development of amendments to the rules for the application of a biosolid, industrial waste products, and pollutant-bearing water in 327 IAC 6.1. Comments were made by the following parties:

Mark Shere, Bethlehem Steel Corporation	(BSC)
Glenn Pratt	(GP)
Patrick Bennett, Indiana Manufacturing Association	(IMA)
Ryan Zeck, Merrell Brothers, Inc.	(MBI)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: I'd like to briefly call your attention to a narrow drafting issue that deserves attention before final adoption, and it may illustrate a slightly broader problem. The narrow issue concerns the wording of the private ponds exclusion in the Indiana statutes. On my handout at the top is the wording for this exclusion as it appears in the statute. The way it's phrased there, a private pond is its own little subcategory. Then there's a separate subcategory for certain facilities built for reduction or control or pollution or cooling of water. The two subcategories are separated by different subsection numbers, by punctuation–a semicolon–and by the word "or" that comes between them.

The current regulatory section, 6.1, in this land application rule has every word the same as the statute. There's a difference in format, with no separate subsections and no semicolon, but it is only format, and you could fairly view the current section 6.1 as have been drafted with the desire to be fully faithful to the statute.

But the proposed language for preliminary adoption is a different story. The word "or," which separated the private ponds from pollution control facilities, has been dropped, and the word "other, has been added to try to link the two subcategories together in a new way. The wording changes are not excessive by any means, but there's no way to view them as neutral formatting either. This is an essential change in the statutory language to try to limit the scope of the private pond exclusion, to make it look like it's just an example of a pollution control facility instead of a separate, independent exclusion. (BSC)

Response: "Private pond" is a key term in the state's definition of "waters" and is currently an issue under discussions related to wetland protection in Indiana. The Water Pollution Control Board has a key role to play in wetland protection and has heard testimony in the past on the importance of the term "private pond" in that context. However, the term "private pond" has no such importance in context to its use in the land application rules. For the land application rule, "private pond" is used in the term "surface water". This term is not utilized in the rule for the purposes of exerting any regulatory authority over such a body of water. The term is used for the purposes of establishing a setback from such bodies of water for applying and storing biosolid, industrial waste product, and pollutant-bearing water. The need to define a term such as "surface water"was first identified in the Confined Feeding Operation (CFO) rules that became effective in March 2002. A CFO approval had been successfully appealed because staff did not consider water running through a field tile qualified as "waters" of the state and were thus subject to a setback from "waters". The Environmental Law Judge disagreed and upheld the appeal of the approval. To avoid such an interpretation, and its resultant impractical application to CFO activities, staff developed the definition of "surface water" for the purposes of applying setbacks for land application of manure. It was a similar thought process that prompted the inclusion of a definition for "surface water" in the proposed Land Application Rule. The department does not view the inclusion of a definition for the term "surface water" as a significant change to the rule. However, the definition of the term "surface water" will be modified to eliminate the exemptions for a private pond, off-stream pond, etc. from the definition to be more consistent with the CFO rules. For the purposes of providing protection of surface waters through setbacks, certainly private ponds and the other features listed should be afforded the same protection from potential run-off of biosolids and industrial waste products.

Comment: A similar manipulation of the words occurs in about half a dozen other places in the proposed rule. The current Rule 6.1 limits the scope to discharges to waters of the state. The proposed rule removes this phrase in what looks like an apparent attempt to extend regulatory controls to nonstate waters. There's a narrow point here about following the statute, and I hope that my raising of the narrow point here will be enough to get IDEM to take another look at the proposed language and to make changes before final adoption. There's also a good chance that the Indiana Supreme Court or the legislature will have more to say about this particular issue within the coming months. (BSC)

Response: Obviously, your suggestion that IDEM was in some manner looking to expand the department's regulatory in the midst of other unrelated discussions on statutory terms as important as "waters" and not fully explaining such intent to the Water Pollution Control Board is very disturbing in it's misinterpretation. The Indiana Department of Environmental Management takes our responsibility to work with the public and the Boards in an open, direct and honest way very seriously. Please see response to the comment above.

Comment: The broad point, which is really what prompts me to bend your ear for a few minutes here, is that a few times lately we've seen very lengthy, detailed rulemaking proposals, with the explanation on the cover of them that the agency is clarifying existing requirements. It's only when you get into the details of the proposal that you see changes that really are not clarifications at all. It's one thing for the agency to say, up front, that it's changing the language for private ponds to reflect the litigating positions that it's taken into court or to reflect policy choices. It's another thing to bury that kind of change in the middle of a 60 page proposal about fertilizer and land conditioning, with nothing really to let you know that it's there. I'd hate to see this kind of practice become more of a pattern, because it really undermines the process for public notice and public comment, and just makes more work for lawyers, like me. I hope that raising the issue today, the concern today, without opposing preliminary adoption, will help keep that pattern from developing further, and that my comment may go a ways towards encouraging more transparent rulemaking. (BSC)
Response: The department made the extent of the changes to this rule quite transparent in the second notice. The following is a quote from that second notice: "The purpose of this rule change is to **amend** and clarify." " Since that time both IDEM staff and the regulated community have concluded that some inconsequential and some **substantive rule changes are required**. Inconsequential changes are contextual in nature and provide more clarity. **The substantial changes improve and enhance the program. The following are considered substantial changes:**

1. A small-quantity generator notification program for non-domestic pollutant-bearing water land application programs.
2. Broadening the agricultural lime substitute notification program to include liquid waste products.
3. Delineation of the hybrid land application permit program.
4. Molybdenum concentration and loading standards.
5. Standard detection limits for seven heavy metals.
6. Clarification of nutrient monitoring requirements and recognition of presampling for nutrients in some cases.
7. Deletion of the suspended solids limits and monitoring requirement for certain stabilization pond systems when disinfection is not required.
8. Recognition of alternative methods of pollutant-bearing water land application to include subsurface methods.
9. Clarification of storage structure applicability and requirements.
10. Elimination of seasonal high water table restrictions during land application."

The Indiana Department of Environmental Management takes our responsibility to work with the public and the Boards in an open, direct and honest way very seriously and works hard to characterize changes appropriately. However, rather than argue about terms such as "clarification" , "substantial", or "inconsequential", the department was looking for substantive comments on the rule changes.

Comment: I've always believed that in fact particularly biosolids are a valuable resource if we can in fact assure that they're safe for use. In fact, as Board Member Wagner is aware, back when we were both at EPA, that I opposed the construction of the Indianapolis incinerator for sludge, because I thought this was a misuse of federal resources for a potentially valuable product that should be cleaned up, as it now is, for land application rather than incineration, causing an air problem. So, I strongly support this, assuming we can assure the safety of people, and I think that this has gone a long ways in moving that way; that originally the whole federal pretreatment program was started because of the contamination of municipal sludge. (GP)
Response: The department agrees.

Comment: We had cases, as you're aware, in Bloomington with very high levels of PCBs. We had in Chicago high levels of cadmium, where the City of Chicago was calling their, quote, "new earth", as they called it, to inner-city vegetable gardens when the sludge exceeded the maximum health levels by tenfold as far as bioconcentrate in leafy green vegetables, and that's exactly what people in their inner-city garden were raising. So, we've had some blatant examples in the past of significantly misuse of the program, and unfortunately back at that time, the State of Indiana as several other states, had to be forced by the Federal Government to analyze the sewage sludge, and this is when the problems of PCBs and other things were found. (GP)
Response: As with most current environmental regulations, the regulations and the program are the result of improper disposal <u>in the past</u>. As new knowledge and the application of that knowledge come to light, so changes in the rules and program occur.

Comment: I think one of the things we have to look at in moving ahead, and particularly with the shortage of resources at IDEM, is that if we're going to have a program that adequately protects people, then we have to have adequate levels of staffing, and we also have to have adequate public information. I think one thing that needs to be modified here, as in the animal waste rules, is that data has to be available to the public on where materials are being applied, and what materials are being applied, as well as we have to assure, along with that modification of the proposed rule, that we have the parallel work in the pretreatment program to assure that we have the required analysis to look for other possible contaminants, so that we don't have the problem of Kepone that happened back east, where it's not on the list of normal things, but we had major contamination from something unique. So, I think the whole idea of eternal vigilance, of assuring, again, the safety of people, is critical if this program is working. And as far as this particular rule, we must have the ability of people to know what's going on. I'm not suggesting posting land or anything, but just that the information needs to be available to all parties on where material is being applied and what's being applied. (GP)

Response: All of the department's active land application sites are posted and updated monthly on the IDEM webpage. Public files that contain analysis results are available to the public. Pretreatment is the responsibility of the industry and the overseers of that program.

Comment: The one thing I would suggest, which is perhaps outside of this, is that I would suggest strongly to IDEM that they move this program back into that Office of Water, because I think it simply, as far as the potential impacts are concerned, is water quality, be it sludge, contamination of groundwater, or be it runoff into surface waters. (GP)
Response: You are correct this is not a rule issue and is outside the scope of this rulemaking.

Comment: One of the things that IDEM—that's been suggested to them for over ten years is that they need to start looking at the potential for breakthrough of phosphorus and other materials that would saturate the groundwater and would then start coming through field tiles back out into the surface water. And the issue was raised by several university research people that we may in fact have a major surface water contamination from some of these applications. (GP)
Response: The department is in the process of gathering data regarding phosphorus as it relates to the land application program. Data may show that additional rule changes and more stringent controls are necessary for phosphorus. However, gathering that data will take time and also time to evaluate the data and set a level or management standards that are fair and well thought out. It is the department opinion that this rulemaking should not be held up waiting on this information that may or may not cause additional changes to the rule at 327 IAC 6.1.

Comment: So, I think along with this work here, IDEM needs to find the resources to assure that these other problems do not occur, and so I think we need a much more proactive agency in addressing this, and again, I think that this is a program that is very good, but there must be the resources and the initiative there to assure that it's worked. (GP)
Response: You are correct this is not a rule issue and is outside the scope of this rulemaking.

Comment: I just wanted to provide a brief comment to you in support of the comments that Mr. Shere made. We've talked about this issue with him and share his concern for that technical consideration in this drafting, and we request your guidance in the development of this rule, to make sure that that's taken care of. (IMA)
Response: Please see the responses to Mr. Shere's comments above.

Comment: I just wanted to speak on behalf of the rule changes and the effort that the Department has made in implementing these changes. Obviously, in our opinion, a lot of them are beneficial and they go a long way in benefitting the land application of biosolids. Obviously the land application of biosolids throughout Indiana is very popular and benefits several facilities, including the farmers, and we're not only talking about just municipalities, but the farmers who are limited and could not get access to the biosolids, and they would definitely feel the effect as much as the municipalities. So based on these rule changes, I would like to just complement the Board----complement IDEM, I guess–for the rule changes that they've made. (MBI)
Response: The department believes that the rule changes will make the rule easier to understand and comply with. The rule also makes the regulation less onerous on several groups and concentrates on placing the most stringent regulations on the wastes that can potentially cause the worst environmental concerns. Because resources are so limited at the department, every effort is being made to make the rules fair, logical and protective of the environment without being onerous or burdensome on either the regulated community or the department.